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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 81 6711

DARRELL WAYNE HILL . . . . . PETITIONER

v.

STATE OF ARKANSAS. . . . . RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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Petitioner Darrell Wayne Hill [hereafter called Hill], a prisoner serving a sentence of life imprisonment without parole, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

QUESTIONS PRESENTED

1. Whether the search of Petitioner's vehicle violated the requirements of Belton v. New York, ___U.S.___(1981), 69 L.Ed.2d768 and Adams v. Williams, 407U.S.143(1971)?

2. Whether the Arkansas Supreme Court's assumption of facts not contained in the record but within the State's burden of proof in regards suppression of evidence seized without a search warrant violated Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the trial Court conducted the aggravation - mitigation phase of the trial in such a way as to deny Petitioner the entry into evidence proffered evidence properly allowable under the doctrine of Lockett v. Ohio, 438U.S.586(1978) and Eddings v. Oklahoma, ___U.S.___(1981)?

4. Whether the introduction during the enhancement - aggravation/mitigation phase of the proceedings of evidence of prior convictions based upon pleas of guilty without representation by legal counsel violated the dictates of Baldasar v. Illinois, 446U.S.222(1980)?

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming Hill's conviction is reported at Hill v. State, ___Ark.___, (February 8, 1982). A copy of the opinion is attached as an exhibit hereto.

JURISDICTION

The opinion of the Supreme Court of Arkansas, after the denial of a timely rehearing petition, was rendered on March 15, 1982. This Court's jurisdiction is invoked under 28U.S.C., § 1257(3), with Hill asserting here and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized.

Fourteenth Amendment; Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Ark.Stat.Ann. §41-1304:

> Mitigating circumstances shall include, but are not limited to the following:
>
> (1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;
>
> (2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;
>
> (3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
>
> (4) the youth of the defendant at the time of the commission of the capigal murder;
>
> (5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;
>
> (6) the defendant has no significant history of prior criminal activity.
> [Acts 1975, No.280, §1304, p. 500.]

STATEMENT OF THE CASE

On February 7, 1980, a service station located in Pencil Bluff, Montgomery County, Arkansas, was robbed. Its proprietor, Mr. E. L. Ward and a customer, Mr. Donald Teague, were abducted, robbed, and shot. Mr. Teague died instantly from his wound. Mr. Ward was shot several times, but survived.

Later that day, Darrell Wayne Hill was driving a maroon Thunderbird with white license plates with dark lettering in Hot Springs, Arkansas, in neighboring Garland County. He was pulled over by two Hot Springs city police officers for investigation. He exited the vehicle upon request, and joined one officer behind the Thunderbird, the other officer searched the vehicle and found

a paper bag under the seat, containing a revolver and loose coins. The officer displayed the weapon to the officer who was with Hill behind the car, who immediately placed Hill under arrest. Hill was charged with capital felony murder, attempted capital felony murder, and two counts each of aggravated robbery and kidnapping.

The seized items were subsequently placed into evidence.

Hill was subsequently convicted of all six offenses, and sentenced as stated above.

Hill appealed his convictions, raising ten issues on appeal; said appeal was denied in an opinion of the Arkansas Supreme Court dated February 8, 1982; rehearing was denied March 15, 1982.

REASONS FOR GRANTING THE WRIT

I. THE STOP AND SEARCH OF PETITIONER AND THE VEHICLE WHICH HE WAS DRIVING WERE ACCOMPLISHED WITHOUT A WARRANT AND OUTSIDE OF ANY WARRANT EXCEPTIONS, INCLUDING SPECIFICALLY "INVESTIGATIVE" STOPS AND SEARCHES PURSUANT TO LAWFUL CUSTODIAL ARREST.

Late in the day that the above stated crimes were committed, Petitioner was stopped by two Hot Springs Police Department Officers on a street in Hot Springs, Arkansas, in neighboring Garland County. The reason for the stop was the similarity of the stopped vehicle and descriptions of the assailant's vehicle broadcast over police radio bands. Said descriptions were of a late model maroon Thunderbird with white license plates with dark lettering.

Petitioner was stopped without any problems. He exited the car upon command. It is not disputed that he was behind the car with one officer when the other officer discovered a sack under the car seat, opened it, found a weapon, displayed the weapon to

the first officer, who then placed Hill under arrest.

Petitioner would ask the Court to note that the trial Court at the conclusion of the suppression hearing made a specific finding of a fact which is uncontrovertible in this situation: i.e., the search could not be justified as necessary to assure and safeguard the safety of the officers; Hill was well outside of any area in which he could have lunged for the weapon had he desired to harm the officers.

Essentially two justifications for this search and seizure have been proposed - an Adams or Terry type of investigative stop and "frisk", or a Belton type of search pursuant to a lawful custodial arrest. See, Adams v. Williams, 407U.S.143 (1972); Terry v. Ohio, 392U.S.1(1968); Belton v. New York, ___U.S.___, 101S.Ct.2860(1981); Chimel v. California, 395U.S. 752(1969).

Several factors place the Hill stop and search beyond these exceptions to the requirement of a search warrant. The search was not necessary to safeguard the officers from harm, under the facts as presented in Court or under the findings of the trial Court. Indeed the Belton Court specifically recognized that the searches authorized therein would not always be acceptable, when the Court stated, at 101S.Ct.2864, that, ". . .articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the are into which an arrestee might reach in order to grab a weapon. . .'"

Further, the Belton Court dealt with a situation where there was no question that the individual was under arrest at

the time of the search. Here, however, the search led to the arrest, not vice versa.

It has been suggested that probable cause to search, or to arrest, existed immediately upon Petitioner's stop and exit from the vehicle, based on the following: the color and make of automobile, which matched the assailant's vehicle; the license plate colors (light with dark lettering), and Hill's physical makeup (medium height, medium build, caucasian, rough face, balding with light colored hair on the sides). The broadcast description of the assailant varied substantially from Hill's actually description in that the clothing was different and the assailant had dark hair (no mention of baldness). The descriptions coincide as to his height, weight and race, and must also coincide with thousands of other average sized white males anywhere around the site of the crime. In essence the opinion of the Arkansas Supreme Court would render white males of thoroughly average build in maroon Thunderbirds in any county adjacent to the site of this crime subject to stop, "investigative" detainment and search of the passenger compartment of their vehicles. It can hardly be countenanced that each of the individuals so treated would be under "custodial" arrest as was the case in, and as reads the language of, the Belton decision.

Was the instant situation an "investigative" stop as that term has been applied in Terry and Adams? First, the search was not needed to safeguard the officers. Second, the stop itself grossly differs from the test as set out in Adams and Terry at 407U.S.146,

> " 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dan-

> gerous to the officer or others he may conduct a limited protective search for concealed weapons. 392U.S., at 24. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to protective purposes.' "

This was not an investigation of suspicious behavior. This was in essence a dragnet of maroon Thunderbirds in a very wide radius of a crime. No one individual was singled out for suspicion; no person was singled out as armed and dangerous. The cases cited above have in common specific facts, such as the informer's tip in Adams, which caused an individual to be singled out and to be feared as armed. The authority of these cases has been broadened by the Courts below in the Hill matter to cover a grossly different type of fact situation, which would make citizens remote from a crime and driving "suspect" vehicles subject to searches of unprecedented scope, and application. The breadth of the lower Court's decision herein amounts to bootstrapping an Officer's hunch or reasonble cause which might legitimately authorize a stop to a grant of probable cause to search every time such a stop is made.

II. THE SUPREME COURT OF ARKANSAS ASSUMED FACTS NOT IN EVIDENCE AND WITHIN THE STATE'S BURDEN OF PROOF IN UPHOLDING THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO SUPPRESS.

On appeal of the trial Court's ruling as regards Defendant's motion to suppress the items seized from the vehicle driven by Defendant, Defendant argued several points including the justifiability of the initial stop and the subsequent search and arrest.

During the Arkansas Supreme Court's response to said points argued for reversal, the Court stated that the vehicle driven by

Defendant was an uncommon one in the area in which it was found (Hot Springs, Arkansas, and relied upon said "fact" in reaching its decision. Petitioner has searched the record and finds no such fact or averment contained in the record.

It is a well founded law that warrantless searches are presumed unreasonable and that the State bears the burden of proving sufficient facts to justify a warrantless search and seizure. Coolidge v. New Hampshire, 403U.S.443(1971). Petitioner respectfully submits that the Arkansas Supreme Court's assumption of said fact and reliance thereon was in gross violation of this principle and constitutes an element of its opinion which is so overreading and unfair as to constitute a denial of Petitioner's rights to due process.

III. DEFENDANT WAS DENIED PLACING INTO EVIDENCE TESTIMONY RELEVANT TO MITIGATION OF HIS SENTENCE OF DEATH DURING THE ENHANCEMENT-MITIGATION/AGGRAVATION PHASE OF THE TRIAL.

During the enhancement-aggravation/mitigation phase of the trial Defendant attempted to place into evidence the testimony of Reverend Victor H. Nixon. Reverend Nixon was present to testify in three general areas: reasons for not executing Hill and based on Hill's background, history, and attitudes, and further based upon Reverend Nixon's expert considerations as a professional counsellor and advisor of both victims and perpetrators of violent crimes, and further based upon his expert considerations as a student of the ethical, philosophical and teological bases of the death penalty.

This testimony produced a series of objections by the State based upon relevance and hearsay.

The Court's first ruling on said objections was that any

testimony not relating directly to Hill was not admissable as not within the six specific mitigating factors set out in Arkansas Statutes Annotated §41-1301.

Ignoring Defendant's response that Nixon's general philosophical, historical and religious discussion of the use of the death penalty was the foundation of his opinion as to why Hill should live, the Court denied admission of such foundation as irrelevant to mitigation. Defendant repeatedly avowed that without the explanation of the source and basis of Nixon's expert opinions, his statement of the reasons for not executing Hill could make no sense whatsoever. Nixon could not state the reasons for his conclusion that Hill should live, and the jury was thus denied access to said testimony.

Further, Nixon was not allowed to testify as to the results of his conversation with Hill, being cut off by further relevance and hearsay objections. Said testimony would have revealed to the jury aspects of Hill's background, history and attitudes, and would also have included such factors as prior familial, social and criminal history, Hill's charitable acts, evidences of Hill's attitudes, belief and character and the sources thereof. All such evidence would have revealed to the jury reasons for not executing Hill.

Petitioner submits that the trial Court's rulings denied the applicability of Lockett v. Ohio, 438U.S.586, 57Ltd2d973, 98S.Ct.2954, to the sentencing of Hill to death in the instant case and under applicable Arkansas law. Petitioner cites the Court to the language of Lockett, 438U.S.586, 604, where the Court concluded that the sentencer should be allowed to hear "any aspect of a Defendant's character and record . . . that the Defendant proffers as a basis for a sentence less than death."

This language was recently cited with approval by the Court in Eddings v. Oklahoma, ___U.S.___,(1981).

IV. DURING THE ENHANCEMENT-AGGRAVATION/MITIGATION PHASE OF THE TRIAL, EVIDENCE OF PRIOR CONVICTIONS WAS PLACED INTO EVIDENCE; SAID CONVICTIONS REFERRED TO AND WERE ENTIRELY DEPENDENT UPON PREVIOUS CONVICTIONS ENTERED WITHOUT THE ASSISTANCE OF COUNSEL.

On March 25, 1964 Defendant was convicted of unauthorized use of a motor vehicle after former conviction of a felony and possession of a firearm after former conviction of a felony.

These convictions were proven by the State for purposes of enhancement of sentence over Defendant's objections. No earlier convictions were proven; however, evidence of two earlier convictions was proffered by the State. Said earlier convictions did not contain the requisite showing of representation by counsel and were thus rejected by the Court.

Thus Defendant was prejudiced in two ways. One, the jury was informed of convictions (the pre-196/ convictions) which would otherwise be totally inadmissible for any purpose under the rule of Scott v. Illinois, 440U.S.367, 59L.Ed.383, 99S.Ct. 1158.

Second, the 1968 convictions which were placed into evidence are totally derivative of the earlier convictions obtained without counsel. The simple fact is that it is not a felony for a non-felon to possess a firearm or to engage in unauthorized use of a motor vehicle and that Defendant's status in 1968 as a felon was totally dependent upon and derivative of a procedure in which he was not represented by counsel, in which the Defendant faces conviction ". . . because he does not know how to establish his innocence . . ." Gideon v. Wainwright, 372U.S.335(1963).

Petitioner submits that entry of the 1968 convictions, as well as informing the jury of the earlier convictions, in the instant proceedings therefore violates the rule of Baldasar v. Illinois, 446U.S.222(1980), regarding the collateral use of uncounselled convictions and their directly derivative enhanced felony convictions as a means of increasing Defendant's punishment herein.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that Court be reversed. This Court should set this matter for oral argument on the issues outlined above.

Respectfully submitted,

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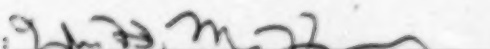
By: 
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APPENDIX

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CRIMINAL — Capital felony murder, kidnapping, aggravated robbery.

Darrell Wayne HILL *v.* STATE of Arkansas

CR 81-18

Supreme Court of Arkansas
Opinion delivered February 8, 1982

Appeal from Montgomery Circuit Court, *Gayle K. Ford*, Judge; affirmed in part, reversed in part.

Bob Keeter and *William H. McKim*, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. On July 11, 1980, following a jury trial, appellant, Darrell Wayne Hill, was convicted and sentenced for capital felony murder (death), kidnapping (50 years), and aggravated robbery (50 years) in connection with offenses against Donald Lee Teague; and for attempted capital murder (life), kidnapping (50 years), and aggravated robbery (50 years) in connection with offenses against E. L. Ward. The 50-year sentences were set to run consecutively to the life sentence.

We affirm the conviction and sentence for capital felony murder but set aside the lesser included offenses of kidnapping and aggravated robbery in connection with offenses against Donald Lee Teague. Ark. Stat. Ann. § 41-105 (1) (a) (2) (a) (Repl. 1977) prohibits the entry of a judgment of conviction on capital felony murder or attempted capital felony murder and the underlying specified felony or felonies. *Swaite* v. *State*, 272 Ark. 128, 612 S.W. 2d 307 (1981); *Singleton* v. *State*, 274 Ark. 126, 623 S.W. 2d 180 (1981). Generally, this Court will not consider errors raised for the first time on appeal; however, as we stated in *Singleton*, *supra*, in death cases we will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and this Court would unquestionably require the trial court to grant relief under Rule 37.

We affirm the convictions and sentences for attempted capital felony murder, kidnapping, and aggravated robbery in connection with offenses against E. L. Ward. The objection that kidnapping and aggravated robbery are offenses included in the offense of attempted capital felony murder was not raised in the lower court. This Court will not consider this issue when raised for the first time on appeal except in death cases. *Rowe* v. *State*, 271 Ark. 20, 607 S.W. 2d 657 (1980), Also *see Rowe* v. *State*, ___ Ark. ___ (January 25, 1982).

I

On February 7, 1980, at approximately 2:00 p.m. appellant drove into E. L. Ward's Service Station in Pencil Bluff, Montgomery County, in a maroon Thunderbird. Ward checked his radiator and filled his car with gas. At this time Donald Teague, a Game and Fish Commission Officer, drove up, also wanting gas, so Ward went inside the garage to clear the pumps. Appellant, who was waiting inside the garage, pulled a gun on Ward and demanded his money. He then ordered Ward to put the money from the cash register into a money bag along with his wallet. At this time Teague entered the garage, and appellant pointed the gun at Teague, told him to put his billfold in the money bag, and told both men that they were going for a ride. Teague was instructed to drive the car and Ward to bring the money bag. While riding, appellant took the money from Ward's wallet and put it in his pocket. Teague was forced to drive to a gravel road off of Highway 88. Appellant then had Teague stop the car, marched the men into some weeds, and forced them to lie down with their hands behind them. Appellant shot Teague several times, killing him. Ward begged him to quit shooting, but appellant then shot at Ward four times, wounding him. Ward dropped into the weeds and did not move or speak until appellant had driven away. He then hollered at Teague, who did not respond, so he crawled back to the road. A pulpwood driver found him there later that afternoon. Ward gave the police a description of his assailant and the car he was driving before he was rushed to a hospital in Hot Springs.

That afternoon at 4:05 p.m. law enforcement offices in the surrounding area began receiving NCIC (National Crime Information Center) radio dispatches regarding these crimes. The Hot Springs Police Department broadcast the description of a white male, 45 to 50 years old, medium build, 160 lbs., rough skinned face, black hair, last seen wearing a gray suit with a blue shirt; vehicle and license described as late model Ford Thunderbird, maroon in color, with dark blue or black lettering on a white license plate. The occupant was described as being armed and extremely dangerous.

At 6:25 p.m. Hot Springs Police Officer Buck observed a vehicle matching this description with a white Oklahoma license plate with dark letters going westbound on Grand in Hot Springs; he radioed in that he was following the car. He stopped the vehicle at about the same time Officer Ward arrived to back him up. Officer Buck used a public address system to advise appellant to step out of the car and keep his hands in plain sight. Officer Buck conducted a frisk search of appellant for weapons. Meanwhile, Officer Ward searched the immediate area of the car where appellant had been sitting, finding a brown paper sack containing a loaded Charter Arms .38 Special and a large quantity of coins under the front seat, driver's side. Appellant was then placed in Officer Buck's vehicle and transported to the police station at approximately 6:45 p.m. Neither of these officers testified regarding a description of the appellant before he was searched: neither while appellant was inside the car, nor after he was directed to stand behind it.

The evidence as set out above and the positive results of the ballistics tests on the gun found in appellant's car lead us to conclude that appellant's convictions were supported by overwhelming evidence of guilt.

II

Appellant argues that the stop and search of his vehicle by the police was unreasonable and that the pistol seized from under the driver's seat should have been suppressed as the fruit of an illegal search. We disagree. The search of the

car was reasonable under the circumstances.[1] Rule 3.1, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977) provides:

> Rule 3.1 Stopping and Detention of Person: Time Limit.
>
> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he *reasonably suspects* is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense. (Emphasis added)

Did the officer reasonably suspect the appellant had committed a felony? Rule 2.1 defines reasonable suspicion as:

> [A] suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The courts have used various terms to describe how much cause or suspicion is necessary or reasonable in order to stop a person or vehicle. The common thread which runs through the decisions makes it clear that the justification for

[1] Officer Ward testified at the hearing on the motion to suppress that, as soon as appellant got out of the car, both he and Officer Buck immediately recognized him as fitting the description of the suspect as broadcast over the police radio. The search, therefore, was justified as being incident to an arrest and permissible under *N.Y. v. Belton, supra.*

the investigative stops depend upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *U.S.* v. *Cortez*, 449 U.S. 411 (1981); *N.Y.* v. *Belton*, ___ U.S. ___, 101 S. Ct. 2860 (1981); *Michigan* v. *Summers*, ___ U.S. ___, 101 S. Ct. 2857 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1967).

Here the police had reasonable suspicion to make an investigatory stop of appellant's late model maroon Ford Thunderbird exhibiting an Oklahoma license plate with a white background and dark letters. The car matched the description of the police broadcast. It was not likely that another vehicle of that description was in the Montgomery-Garland County area at that time. Also, the crimes had just recently been committed in the small community of Pencil Bluff in neighboring Montgomery County.

Since the investigatory stop was justified, the police were then allowed to make a limited search for weapons to protect themselves from attack by a suspect they had every reason to believe was armed and very dangerous. *Adams* v. *Williams*, 407 U.S. 143 (1972). Rule 3.4, Ark. Rules Crim. Proc. specifically authorizes a search for weapons in a situation such as existed here:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person *and the immediate surroundings* for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others. (Emphasis added)

This rule is consistent with the rule set forth in *Terry* v. *Ohio*, *supra*, which emphasizes that the purpose of the protective search is wholly for the safety of the police officer:

> We are now concerned with more than the govern-

mental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

In *Terry* the Court dealt specifically with a limited protective search of a pedestrian. However, the principles enunciated in that case are wholly consistent with the concept that an automobile's passenger compartment may be the subject of a limited search, in circumstances such as those presented here, for the protection of officers who otherwise might be endangered.[2] *See e.g. United States* v. *Thomas*, 314 A. 2d 464 (D.C. App. 1974).

The search here was completely reasonable when considered under the totality of the existing circumstances. The officers would have taken an unnecessary risk if they had attempted to talk with the appellant before searching him and the accessible areas of his car; removing appellant from his car was a prerequisite to the safety of the officers in making such a search. Although appellant was standing behind the car with his hands on the trunk at the time of the search, the mere fact of appellant's removal from the car did not remove the possible danger to the officers and thereby obviate the necessity for the search. It was certainly reasonable to believe that a suspect believed to have kidnapped, robbed, and executed a Game and Fish Officer, and, simultaneously, attempted to do the same thing to another person was capable of breaking for a weapon inside his car, and probably would have been highly motivated to do so.

---

[2] In instances where a person is arrested in an automobile, *New York* v. *Belton*, *supra*, standardized the concept of what is the immediate surrounding area for the purpose of a protective search to include the entire passenger compartment of the automobile in which the person arrested was located. Since the purpose of the protective search is for the safety of the police officer, the rationale of *Belton* must be equally applicable to searches of automobiles after investigatory stops even though, as in *Belton*, the suspect is no longer inside the automobile.

Here, the limited search of the car was both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry* v. *Ohio, supra.*

III

Appellant argues that the trial court erred in not granting his motion for a change of venue. Ark. Stat. Ann. § 43-1501 (Repl. 1977) provides:

> Any criminal cause pending in any circuit court may be removed . . . whenever it shall appear . . . that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein.

To prove prejudice in this case appellant introduced four issues of the local newspaper which had carried stories about the crime. Appellant did not allege or prove any television or radio coverage of the crime. At the special hearing on the change of venue appellant also introduced testimony from six witnesses who testified that they did not think defendant could receive a fair trial in Montgomery County. Three witnesses for the State testified that he could. The trial judge specifically found that none of the defense witnessed showed that they were cognizant of prejudice existing throughout the whole county, but merely portions of the county. In *Bailey* v. *State*, 204 Ark. 576, 163 S.W. 2d 141 (1942) we stated that the statute which provides methods of proving prejudice, Ark. Stat. Ann. § 43-1502 (Repl. 1977), contemplates that the witnesses should have fairly accurate information concerning the state of mind of the inhabitants of the entire county.

A motion for a change of venue is directed to the sound discretion of the trial court and is not subject to reversal except for an abuse of that discretion. *Rush* v. *State*, 238 Ark. 149, 379 S.W. 2d 29 (1964). Under the facts of this case we cannot say that the trial court abused his discretion.

IV

Appellant argues that the trial court erred in not excusing certain jurors for cause. We recently held in *Conley v. State*, 270 Ark. 886, 607 S.W. 2d 328 (1980) that in order to preserve this point for appeal appellant must have exhausted his peremptory challenges and must state for the record that there is someone actually sitting on the jury that he would have stricken if he had had another peremptory challenge. Also, it must appear from the record that the trial judge should have excused the juror for cause.

Here, the record reflects that appellant did exhaust his peremptory challenges, and that appellant objected to juror Reed who sat on the jury. However, the trial court was correct in not striking juror Reed for cause. Reed stated on *voir dire* that she was related to one of the victims in a complicated way, but the record is silent on how close the relationship actually was. Defense counsel's reason for asking the court to strike her for cause was that she had stated that "Anybody that is brought in is under suspicion either if they are innocent or guilty; they are just as much guilty as they are innocent when you pick them up or they wouldn't be picked up in the first place." After this statement, however, the court advised her as to the presumption of innocence. She then stated that she understood the law to be innocent until proven guilty, and said she could follow this law. This juror was sufficiently rehabilitated by the trial court so that we cannot say it was error to not strike her for cause.

Appellant also argues it was error to allow the State to peremptorily challenge two jurors who expressed opposition to the death penalty. These jurors were not excused for cause by the court but were peremptorily stricken by the State. Under such circumstances no explanation is necessary as to why a potential juror is being excused.

V

Appellant argues that the trial court erred in refusing (1) to grant his motion to make the victim, Mr. Ward, talk

with defense attorneys, and (2) in refusing to allow defense attorneys to *voir dire* the sheriff concerning a conversation between the sheriff and a deputy in which the sheriff allegedly stated that "They will probably have me on trial in the morning concerning Mr. Ward."

The trial court refused to order Mr. Ward to discuss the case with defense counsel, but suggested that the prosecuting attorney furnish to defense counsel the substance of Mr. Ward's testimony whereupon the prosecuting attorney delivered to defense counsel a statement Mr. Ward had given to the state police. At trial, Mr. Ward testified that no one had told him not to speak with defense counsel. He explained that he had talked to defense counsel over the phone, but that he wasn't going to tell anyone anything over the phone, and that he wasn't going to talk to defense counsel unless the prosecuting attorney was present.

We cannot say the trial court abused its discretion in declining defense counsel's request to compel Mr. Ward to discuss the case with him or in refusing defense counsel's request to *"voir dire"* the sheriff regarding his conversation with the deputy. Appellant made no showing as to what information was sought by these motions or that a favorable ruling by the court would materially aid in the preparation of the defense. Nor did appellant show that he was in any way prejudiced by the court's actions in denying the motions.

VI

Appellant argues that reversible error was committed when a state witness referred to appellant's prison records during the guilt-innocence phase of the trial. The state's witness, a psychiatrist with Arkansas State Hospital, testified that his psychiatric diagnosis of appellant was based on personal interviews and various psychological examinations that had been administered to appellant. He was then asked if there were any other tools he used in forming his opinion. He answered, "I did have the results of previous examinations conducted at the Vinita State Hospital. I also had access to his prison records." Defense counsel moved for

a mistrial. The trial court then admonished the jury that they must not consider the witness's statement.

This cautionary instruction to the jury made harmless any prejudice that may have occurred and this is especially true in view of the overwhelming evidence of guilt. Declaring a mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury. *Cobb* v. *State*, 265 Ark. 527, 579 S.W. 2d 612 (1979). The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and the decision of the trial court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Brown* v. *State*, 259 Ark. 464, 534 S.W. 2d 207 (1976). *Dean* v. *State*, 272 Ark. 448, 615 S.W. 2d 354 (1981).

VII

Appellant argues that the photographs of the bullet wound in Teague's head should not have been admitted. We disagree. The picture was not shocking or grotesque and was not likely to unfairly prejudice or inflame the jury. The question of admissibility of photographs lies largely in the sound discretion of the trial court. *Tanner* v. *State*, 259 Ark. 243, 532 S.W. 2d 169 (1976).

VIII

Appellant argues that the trial court erred in limiting the testimony of Reverend Nixon, a defense witness in the penalty phase of the trial. Reverend Nixon attempted to testify to appellant's charitable acts which appellant had related to him in a two-hour conference before trial. The trial court sustained the State's objection to Reverend Nixon's testimony that appellant wanted to donate a kidney. The court stated at a bench conference that appellant could testify if he so desired. Counsel for appellant was then encouraged to continue examining the witness, but declined to do so.

Ark. Stat. Ann. § 41-1301 (4) permits the introduction of

evidence as to any mitigating circumstances in a capital murder case regardless of its admissibility under the rules of evidence. However, this statute was not designed to create a vehicle for intentional circumvention of the rules of evidence. The rules of evidence should be followed when possible. In this case the witness was available to testify and there was no reason for the admission of this hearsay testimony.

Appellant also argues that Reverend Nixon should have been allowed to testify as to the religious and ethical considerations applicable to the death penalty. Religious and philosophical approaches to the death penalty are not relevant as mitigating evidence. *Franklin* v. *State*, 245 Ga. 141, 263 S.E. 2d 666 (1980).

IX

Appellant argues that it was error to allow the State to prove, during the penalty phase, three prior convictions that did not involve threat or violence.

For purposes of sentence enhancement as a habitual offender, the State proved that appellant had been convicted of five prior felonies pursuant to Ark. Stat. Ann. § 41-1001 (Repl. 1977):

> (2) A defendant who is convicted of a felony and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows: . . .

Of these five prior convictions the State used two robbery convictions to prove aggravating circumstances under Ark. Stat. Ann. § 41-1301 (Repl. 1977). This statute provides that if a defendant is found guilty of capital murder, the jury may hear evidence as to aggravating circumstances. Prior offenses for purposes of aggravating circumstances are specifically limited by Ark. Stat. Ann. § 41-1303 (Repl. 1977) to offenses involving threat or violence:

Aggravating circumstances. — Aggravating circumstances shall be limited to the following:

. . . .

(3) the person previously committed another felony an element of which was the use or threat or violence to another person or creating a substantial risk of death or serious physical injury to another person; . . .

Appellant argues that the jury may have improperly considered the convictions introduced for enhancement purposes, some of which did not involve threat or violence, when they were considering aggravating circumstances. Apparently, appellant's position is that there should be two separate hearings on sentencing when capital and non-capital offenses are being tried together. This argument has no merit. Our statutes merely provide for a bifurcated procedure under which sentencing is separate from the determination of guilt or innocence. *See State* v. *Greenawalt*, 128 Ariz. 150, 624 P. 2d 828 (1981). Furthermore, the court clearly instructed the jury that they were to consider only the two robbery convictions as aggravating circumstances. They were also instructed that the other convictions were to be considered only for enhancement purposes on the charges of robbery, kidnapping, and attempted murder.

Appellant further argues that the court erred in allowing the State to submit the conviction for "unauthorized use of a motor vehicle after former conviction of a felony" for purposes of sentence enhancement under Ark. Stat. Ann. § 41-1001. Appellant argues that this conviction should not have been admitted since there was no proof that appellant was represented by an attorney when he was convicted of the "former felony." There is no merit to this argument. The record reflects that appellant was represented by an attorney when he was convicted of "unauthorized use of a motor vehicle after former conviction of a felony." This is the crime that the State used for enhancement purposes. The statute only requires proof of a prior conviction, not the underlying elements of the conviction.

Appellant also argues that the jury may have improperly considered the six findings of guilt that they had just entered as felonies for purposes of enhancement and aggravation during the penalty phase of the trial. We find no merit to this argument. We can assume that the jury understood the court's instructions and understood the verdict forms which refer to conviction for *previous* felonies.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979) and find no error. *cf. Singleton* v. *State, supra.*

Affirmed in part; reversed in part.

HICKMAN, J., concurs. See *Singleton* v. *State*, 274 Ark. 126, 623 S.W. 2d 180 (1981).

HOLT and DUDLEY, JJ., concur.

PURTLE, J., concurs in part; dissents in part.

ROBERT H. DUDLEY, Justice, concurring. I concur in the result and agree with the reasoning expressed on all but one issue — the search. On that issue the majority opinion sanctions the search of the passenger compartment and the resulting seizure of evidence on the basis of a search incident to an arrest. That part of the holding disregards the Fourth Amendment because an investigatory stop does not require probable cause. In a footnote the majority opinion states that the search also can be justified as a search incident to arrest. That latter reason is the only basis on which this case can be sustained.

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, 392 U.S. 1 (1968) quoted in *Michigan* v. *Summers*, ___ U.S. ___, 101 S. Ct. 2587 (1981). Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *Delaware* v. *Prouse*, 440 U.S. 648 (1979). In this case there are two seizures, seizure of the person and seizure of the evidence. The Supreme Court of

the United States has treated the two in differing ways. Seizure of the person involves a higher governmental interest than does seizure of evidence. The former allows an official intrusion for the intense governmental interest of protecting the safety of the arresting officer while the latter allows a lesser intrusion based only upon the governmental interest in preventing the concealment or destruction of evidence. The Court has traditionally limited the reach of any Fourth Amendment exception to that which is necessary to accommodate the identified needs of society. *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

The difference between the two seizures is illustrated by stating the general rule for each. An arrest, or seizure of a person, without a warrant is valid only when the arresting officer has reasonable grounds to believe that the arrested person has committed a felony, *Johnson* v. *State*, 249 Ark. 208, 458 S.W. 2d 409 (1970); *United States* v. *Di Re*, 332 U.S. 581 (1948): *Johnson* v. *United States*, 333 U.S. 10 (1948), while a seizure of evidence without a warrant is, per se, unreasonable. *Katz* v. *United States*, 389 U.S. 347 (1967).

The Supreme Court of the United States has recognized four exceptions, which are material to this case, where warrantless seizures of the person can be based on less than probable cause and still comply with the reasonableness standard of the Fourth Amendment.

First, in *Terry* v. *Ohio*, supra, a limited stop and frisk was approved. Second, in *Adams* v. *Williams*, 407 U.S. 143 (1972) a stop was approved to investigate an informant's tip that the person stopped was armed and carrying narcotics. Third, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the Court held that border patrol officers may make investigatory stops of vehicles near the country's borders if there are articulable facts that reasonably warrant a suspicion that the vehicle contains illegal aliens. Fourth, in *United States* v. *Cortez*, 449 U.S. 411 (1981), the Court held that police could make an investigatory stop where there is an objective manifestation that the person is, or is about to be, engaged in criminal activity. Again, the investigatory stop does not have to be based on probable cause, it can be

267 U.S. 132 (1925); *Arkansas* v. *Sanders*, supra; *Colorado* v. *Bannister*, 449 U.S. 1 (1980).

There is also the "automobile exception" where the scope of a search incident to a lawful custodial arrest, as opposed to investigatory stop, extends over the entire passenger compartment of the automobile in which the person arrested was riding. *New York* v. *Belton*, ___ U.S. ___, 101 S. Ct. 2860 (1981). Generally, however, the scope of a search incident to a lawful arrest is governed by the principles set forth in *Chimel* v. *California*, 395 U.S. 752 (1969). These exceptions, based on probable cause, sanction a limited search to prevent the concealment or the destruction of evidence. While this area of search is limited, it is broader than the very narrow area of protective search based only upon reasonable suspicion. The reason is that the higher standard of probable cause allows the sanctioning of a greater governmental interest without violating the reasonableness clause of the Fourth Amendment.

The exceptions announced in *Carroll*, *Arkansas*, *Colorado*, *New York* and *Chimel* have two governmental interest bases; first, the need to protect the officer and, second, the need to prevent the concealment or destruction of evidence. The first basis can be authorized by reasonable suspicion, while the second is authorized only when there is probable cause either for the arrest or for believing the vehicle contained evidence of a crime. Yet, the majority opinion sanctions a search to prevent the concealment of evidence, not on arrest and probable cause, but on an investigatory stop and reasonable suspicion. That result is based upon the fallacious assumption that a valid exception to the Fourth Amendment for the seizure of a person on less than probable cause creates a second exception of equal standing for the seizure of evidence. Such a double exception swallows the general rule that Fourth Amendment seizures of evidence are reasonable only if based on probable cause.

In the case before us the police had probable cause to arrest appellant, as opposed to stop to investigate, and that is the only basis upon which the search of the passenger

based upon the lesser standard of reasonable suspicion. Not one of these cases discussing a warrantless arrest upon only a reasonable suspicion intimates that an accompanying search and seizure of evidence can go beyond protection of the police officer's safety.

A seizure of evidence without a warrant is, per se, unreasonable. The Supreme Court of the United States has set forth only one narrowly drawn exception where a seizure of evidence can be based on less than probable cause. It is the protective search doctrine set out in *Terry* v. *Ohio*, supra, and *Adams* v. *Williams*, supra. It authorizes a search of the clothing and that area which is immediately reachable by the arrested person. The basis of this exception is that the arresting officer has every right to assure himself that the person does not have within reach a weapon, although the weapon may be evidence. The rationale of this exception is applicable to an investigatory stop, an arrest, a frisk, or any other seizure. It was applicable to the case before us and the frisk of the appellant was obviously valid. If a gun had been discovered during the frisk, it would have been admissible evidence. However, the appellant had been behind his car, had already been frisked and was about to be placed in the arresting officer's car when a second officer conducted a search of the interior of appellant's car. The search of the interior of the car was not necessary for the officer's protection. It was necessary only to prevent the concealment or destruction of evidence.

All cases approving a warrantless search to prevent the concealment of evidence are synthesized with probable cause. Until probable cause is shown the warrantless search is narrowly limited to the governmental interest of protecting the police officer. After the probable cause standard is met the Court has not so narrowly defined the governmental interest and, as a result, the sanctioned area of the search is not as narrow. The Court has stated that a warrantless search of an automobile can be valid where the police have probable cause to believe the vehicle contains evidence of a crime. The governmental interest causing the Court to authorize this exception is the mobility of an automobile and the concealment of evidence. *Carroll* v. *United States*,

compartment of the automobile can be sustained. I would affirm on that basis. See *New York* v. *Belton*, supra.

I am authorized to state that Mr. Justice HOLT joins in this opinion.

JOHN I. PURTLE, Justice, concurring in part, dissenting in part. I concur in that part of the majority opinion which affirms the sentence of capital felony murder wherein the penalty was set at death by electrocution. Also, I agree that it is plain error for the court to have sentenced the appellant to the lesser included offense of kidnapping and aggravated robbery in connection with the death of Donald Lee Teague.

I dissent from that part of the majority opinion which fails to apply the plain error rule to the lesser included charges in the case involving E. L. Ward. For the Ward episode the court sentenced the appellant for attempted capital murder, kidnapping and aggravated robbery. Although it is a mystery how he is going to serve any of these sentences if he is put to death, I nevertheless would like to see the record kept straight. By failing to recognize plain error at this time we are simply prolonging this case because we know with absolute certainty that the case is going to come back to us under a Rule 37 Petition and in all likelihood another full appeal. If we follow our present opinions, we will at that time set aside these sentences just as we finally did in the case of *Rowe* v. *State*, ___ Ark. ___ (January 25, 1982), ___ S.W. 2d ___ We had also corrected the matters in *Swaite* v. *State*, 272 Ark. 128, 612 S.W. 2d 307 (1981); *Singleton* v. *State*, 274 Ark. 126, 623 S.W. 2d 180 (1981); and *Earl* v. *State*, 272 Ark. 5, 612 S.W. 2d 98 (1981).

Because of the foregoing reasons I would correct the sentence imposed in this case by deleting the convictions of aggravated robbery and kidnapping with regard to the offenses against E. L. Ward as we did with the same charges relating to the offenses against Donald Lee Teague.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 81-6711

DARRELL WAYNE HILL — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search of Petitioner's vehicle violated the requirements of Belton v. New York, ____U.S.____(1981), 69 L.Ed. 2d 768 and Adams v. Williams, 407 U.S. 143 (1971)?

2. Whether the Arkansas Supreme Court's assumption of facts not contained in the record but within the State's burden of proof in regards suppression of evidence seized without a search warrant violated Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the trial court conducted the aggravation- mitigation phase of the trial in such a way as to deny petitioner the entry into evidence proffered evidence properly allowable under the doctrine of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, ____U.S.____ (1981)?

4. Whether the introduction during the enhancement-aggravation/ mitigation phase of the proceedings of evidence of prior convictions based upon pleas of guilty without representation by legal counsel violated the dictates of Baldasar v. Illinois, 446 U.S. 222 (1980)?

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STATUTES

Ark. Stat. Ann. §41-1301 - §41-1351 (Repl. 1977)

Ark. Stat. Ann. §41-1001 (Repl. 1977)

Rule 17.1(c), Rules of the Supreme Court of the United States

OPINIONS BELOW

The opinion of the Arkansas Supreme Ccurt affirming petitioner's conviction and sentences of life imprisonment, death and two fifty year terms is reported at Hill v. State, ___ Ark. _____ (Feb. 8, 1982). Two other fifty year sentences for underlying felonies were vacated by the Court. A copy of the opinion is reproduced in petitioner's appendix.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

§ 41-1301. Trial of Persons Charged with Capital Murder.--- The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) [§ 41-1302]; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 [§ 41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 [§ 41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencings. [Acts 1975, No. 280 § 1301, p. 500.]

STATEMENT OF THE CASE

On February 11, 1980, petitioner was charged by an information filed in the Circuit Court of Montgomery County, Arkansas, with capital murder, attempted capital murder, two counts of aggravated robbery and two counts of kidnapping. It was alleged that the petitioner kidnapped and robbed at gunpoint E. L. Ward, a gas station attendant, and Donald Lee Teague, a Game and Fish Commission officer. After driving to a secluded area, petitioner shot and killed Teague and shot and wounded Ward.

The crime occurred early in the afternoon on February 7, 1980. The petitioner was arrested within a few hours in a neighboring county. Petitioner filed a motion to suppress evidence seized at his arrest. At an omnibus hearing following the presentation of evidence on this issue, said motion was denied.

The case was tried before a jury from July 7 to July 11, 1980. At the conclusion of the evidence which included psychiatric evidence and rebuttal on the defense of mental disease, appellant was found guilty as charged.

Evidence was then received relevant to sentencing. The jury returned the verdicts with sentences of death by electrocution on the capital murder charge, life on the attempted capital murder charge and fifty years each on the two kidnapping and two aggravated robbery charges. The court entered judgment on July 11, 1980 pursuant to these verdicts and set October 7, 1980 as the date of execution.

The conviction was affirmed on appeal. A petition for rehearing was denied on March 15, 1982.

REASONS FOR DENYING THE WRIT

I.

THE WARRANTLESS SEARCH OF PETITIONER'S VEHICLE WAS REASONABLE UNDER THE CIRCUMSTANCE WHICH ESTABLISHED BOTH PROBABLE CAUSE FOR A SEARCH INCIDENT TO ARREST AND FACTS JUSTIFYING A PROTECTIVE SEARCH FOR WEAPONS.

Petitioner filed a motion to suppress items seized during the warrantless search of his vehicle at the time of his arrest. The arrest itself was not challenged. The trial court denied the motion following a hearing at which the two arresting officers testified. The Arkansas Supreme Court affirmed this decision on appeal.

Officer Buck testified that he stopped the petitioner's car based on its matching the description given by the radio transmission. The radio transmission was based on information supplied by the surviving victim of the crime. It included a description of the suspect's car, its license tag and the suspect himself. It also included the information that the suspect was armed and extremely dangerous as he had robbed and kidnapped two individuals, killed one of them and attempted to kill the other.

Officer Buck instructed the petitioner over the public address system to exit his vehicle. Officer Ward had arrived at this time to back-up Officer Buck. As Buck detained the appellant at the back of the car, Ward quickly checked the immediate area around the driver's seat. He found a Charter Arms .38 Special in a sack with a large amount of coins. Shots from the gun were later tested and compared to bullets removed from both victims with positive results. Following the search, the petitioner was formally placed under arrest.

The Arkansas Supreme Court unanimously found that probable cause existed for appellant's arrest based on the descriptions of the suspect and his car. Thus, the search was justified as being incident to an arrest, citing New York v. Belton, ___ U.S. ___ (1981) A majority of the court also held that under

the totality of the circumstances, the search could also be justified as a limited search for weapons following an investigatory stop, citing Adams v. Williams, 407 U.S. 143 (1972) and Terry v. Ohio, 392 U.S. 1 (1967).

Petitioner attacks the "arrest" theory because the search preceded the formal arrest. He attacks the "weapons" theory as the petitioner had exited the car where the weapon was actually found. Respondent submits that the Arkansas Supreme Court properly applied the appropriate legal concepts to the facts of this case.

The actions of the police officers clearly establish that they were operating under the reasonable belief that they had the armed and extremely dangerous suspect in custody. The suspect, his car and the tag, all accurately fit the detailed descriptions which had been broadcast. Officer Buck did not approach the petitioner until he had instructed him over the public address system to exit the vehicle and keep his hands in plain sight. The search of the vehicle for weapons and the frisk of petitioner's person occurred virtually simultaneously by the two officers. The petitioner was then placed under formal arrest. According to the police log only twenty minutes elapsed between the first call that a stop was going to be made until the subseqeunt call that the suspect was in custody.

The reasonableness of the officers' actions is established by the particularized descriptions of the vehicle, the tags and the suspect himself. The unique combination of these three descriptions combined with the proximity in time and space of the stop and the crime accurately focused suspicion on the petitioner. The officers acted responsibly in using utmost caution in stopping the vehicle and approaching the petitioner.

As the officers had the petitioner effectively in custody, and had probable cause to believe he had committed multiple felonies, their search was justified both as incident to the arrest and as a protective search for weapons under Belton, Terry and Adams.

II.

THE SUPREME COURT OF ARKANSAS PROPERLY BASED ITS OPINION UPON FACTS WHICH WERE IN EVIDENCE.

The petitioner attacks the Arkansas Supreme Court's opinion as assuming facts not in evidence in holding that "It was not likely that another vehicle of that description was in the Montgomery-Garland County area at that time." Respondent submits that the opinion of the court was properly based upon facts which were in evidence.

The police radio broadcast included the description of the vehicle, a late model maroon Ford Thunderbird; the car tags, white background and dark letters; and the suspect. Though the police could not completely see the driver until he exited the car, they were aware that they were seeking a lone male driver. The proximity in time and space was also a crucial factor, i.e. the crime was committed just a few hours earlier with the initial radio broadcast being even more recent and the crime was committed in the neighboring county.

Certainly, the Arkansas Supreme Court took all these factors into consideration in holding that the stopped vehicle was an "uncommon" one; it was not the vehicle alone, but the juxtaposition of all of these facts which support that conclusion. Certainly, the State met its burden under Coolidge v. New Hampshire, 403 U S. 443 (1971) in introducing sufficient facts to justify the search.

III.

THE PETITIONER WAS NOT DENIED THE OPPORTUNITY TO INTRODUCE PROPER MITIGATION TESTIMONY DURING THE PENALTY PHASE OF THE TRIAL.

Petitioner called Rev. Victor H. Nixon, a Methodist minister, to testify on mitigating circumstances in the penalty phase of the trial. The witness was trained in counseling and in the religious and ethical considerations relevant to the death penalty. He had met with the petitioner after he was charged with capital murder for two one-hour sessions.

The State objected several times during Nixon's testimony on two different grounds, relevancy and hearsay. The State first objected to the relevancy of the background of the witness and his experience in counseling. The petitioner's proffer was that Rev. Nixon would testify as to petitioner's personal history and the religious and ethical considerations applicable to the death penalty. The court expressed its concern about the latter going to the legality of the death penalty and not mitigating circumstances, but allowed the testimony to continue over the State's objection.

The State next objected on hearsay grounds when the witness testified as to his conversations with the petitioner. The court overruled the objection, stating that the witness could establish the foundation for his opinion that the petitioner was not a proper candidate for the death penalty. The State objected when the witness testified that the victim wanted to donate a kidney. The trial court sustained this objection, but encouraged counsel for petitioner to continue with his examination of the witness. Petitioner's counsel made the decision to pass the witness.

In construing Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977) in a recent decision, Hobbs v. State, 273 Ark. 125, 617 S.W.2d 347 (1981), the court stated:

> While evidence offered in mitigation should not be refused simply because it would not be admissible in a trial, that does not mean that it does not have to have some relevant or probative value regarding the mitigation. The statute tends to relax the requirements of admissibility. That relaxation would go to perhaps authenticity or in the case of testimony, perhaps hearsay, either of which might prevent admissibility in a trial. That does not mean that the General Assembly intended to totally open the door to any and all matters simply because mitigation is the issue.

Nixon's testimony primarily covered the personal background of the appellant, as related to him by the appellant himself. The witness' knowledge of the appellant was obviously very limited due to his having only met with him for two hours. Though the appellant could have taken the stand in his own behalf, the trial court did not sustain a hearsay objection by the State on this basis.

The trial court sought to guide counsel on the relevancy objections. Clearly a dissertation on the religious and ethical considerations applicable to the death penalty per se are not relevant to a jury's consideration of the imposition of a death sentence in a particular case.

In examining state statutory provisions with regard to mitigating factors, the United States Supreme Court uniformly refers to evidence relevant to the particular defendant or the particular offense. See Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

Other state supreme courts have dealt with this issue and held that evidence offered in mitigation must be relevant to the defendant himself or to the crime at issue. Franklin v. State, 245 Ga. 141, 263 S.W.2d 666 (1980); Irving v. State, 316 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913 (1979); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979); cert. denied, 444 U.S. 1103 (1980). In Franklin, after reviewing defendant's proffer of testimony by a reporter, a prison chaplain and a professor of religion, the Georgia Supreme Court upheld the trial court's exclusion of this testimony in that "descriptions of executions and of life on death row, statistics relating to executions, and religious and philosophical approaches to the death penalty" are not relevant as mitigating evidence. Franklin v. State, 263 S.W.2d at 672-73.

Respondent submits that the trial court properly ruled on objections made during the mitigation testimony of Rev. Nixon. The witness was properly allowed to testify as to the petitioner's personal history which affected his character. If the witness had more to offer on how the petitioner's background related to the specific crime, it was encumbent upon the petitioner to continue the examination of this witness which he chose not to do. The limitation by the trial court of the testimony of this witness to evidence relevant to the issue of mitigation for this particular defendant and this particular crime was entirely proper under Arkansas law and the United States Constitution.

IV.

EVIDENCE OF PRIOR CONVICTIONS WAS PROPERLY ADMITTED INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL.

Petitioner was charged with and found guilty of two counts of kidnapping, two counts of aggravated robbery and attempted capital murder. The sentences for these charges were subject to enhancement under Ark. Stat. Ann. § 41-1001 (Repl. 1977). Appellant was also charged with and found guilty of capital murder. The sentence for this offense is decided under procedures outlined in Ark. Stat. Ann. § 41-1301 to § 41-1351 (Repl. 1977).

During the penalty phase of the bifurcated trial, the State introduced evidence of five prior felony convictions. The petitioner was represented by counsel at each of these convictions.

Date	Case No.	Charges	State
3-25-64	20487	Unauthorized use of a motor vehicle after former conviction of a felony	Oklahoma
3-25-64	20488	Possession of a firearm after former conviction of a felony	Oklahoma
9-12-68	6437	First degree robbery	Missouri
9-9-70	CRF-70-689	Carrying firearms after former conviction of a felony.	Oklahoma
9-9-70	CRF-70-690	Robbery with firearms after former conviction of felony	Oklahoma

The trial court clearly instructed the jury that they were to consider only the robbery convictions, Case No. 6437 and Case No. 79-690 as aggravating circumstances. The other convictions were to be considered only for enhancement purposes on the other charges. The petitioner objected to this procedure.

The Jury did find as an aggravating circumstance on the capital murder charge that the petitioner had committed another felony which had as an element the use or threat of violence to another person or creating substantial risk of death or serious physical injury to another person. The jury also found on each of the other charges that petitioner had been convicted of four or more prevous felonies. The two robbery convictions were competent evidence upon which to base a finding of an aggravating circumstance. Even without the previous convictions, the other aggravating circumstances which

the jury found would be sufficient to uphold the death penalty.

The four Oklahoma convictions refer to former convictions. Of course, there is no problem with the two September 1970 convictions referring to prior convictions as the two March of 1964 convictions are in evidence. The March of 1964 convictions refer to a former conviction which is not in evidence and for which it is unknown whether the appellant was represented by counsel. Lack of representation on the pre-1964 conviction was a proper consideration in 1964 when the petitioner was represented by counsel. It is not a consideration now even as a collateral matter under Baldasar v. Illinois, 446 U.S. 222 (1980).

Respondent submits that evidence of prior convictions was properly admitted into evidence during the penalty phase of the trial. Certainly there is no question that the death penalty was based upon counseled prior convictions for violent crimes. The life sentence and the remaining fifty year terms underlying the life sentence were properly enhanced by consideration of the five counseled prior convictions. The mere possibility that the pre-1964 conviction underlying the 1964 convictions was not counseled is irrelevant as that conviction was not before the jury.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

Although respondent recognizes that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his

direct appeal.

Therefore, for these reasons and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that a copy of the foregoing Response has been served on petitioner herein, by mailing a copy of same, postage prepaid, addressed to his attorney, William H. McKimm, 135 Elder Street, Mt. Ida, Arkansas 71957, this 21st day of June, 1982.

Leslie M Powell
LESLIE M. POWELL